United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-10 OF 1995

CHONG SIEW FAI CJ (SABAH & SARAWAK), ABU MANSOR ALI AND ABDUL MALEK AHMAD FCJJ

21 OCTOBER 1999

Companies and Corporations *— Winding up — Service of petition — Service made at respondent's old address — Change of address lodged with Registrar of Companies — Differences in original receipt issued by Registrar of Companies and photocopy included in appeal records — Differences not explained by petitioner — Whether service valid — Whether service effected at respondent's registered address — Companies Act 1965 s 218 — Companies (Winding-up Rules) 1972 r 25(1)*

The appellant (petitioner) had on 17 January 1994 been granted an order in terms to wind up the respondent company. On 10 June 1994, the respondent applied to set aside the default order made on 17 January 1994 which was allowed by the High Court. The appellant appealed to the Court of Appeal. The Court of Appeal held that there was irregularity of service of the winding-up petition as the petition was served on the respondent's old address. Notice of change of the respondent's registered address was lodged with the Registrar of Companies on 1 February 1992 and service of the petition was on 26 February 1992 at the old address. As the effective date for the purpose of the notice was the date of lodging and not the date the notice of change is entered in the register, the service of the petition was bad in law. The appellant appealed to the Federal Court. Questions arose in respect of the original receipt for the purported change of address issued by the Registrar of Companies and its photocopy in the appeal records.

Held, allowing the appeal:

There were differences in the original receipt issued by the Registrar of Companies and the photocopy which is included in the appeal records. On the original receipt, there were two numbers given namely '082329T' and '008085X' which must belong to two other companies and not to the respondent. These numbers cannot be clearly seen in the photocopy. Further, why the handwritten words 'Richland Trade & Dev S/B Annual Return $50.00' do not appear in the original has not been explained (see p 394A–D). The Court of Appeal would have come to the same conclusion if they had sight of the original receipt. The service on the respondent is valid and consequently the finding of the Court of Appeal that it was otherwise has to be set aside (see p 394H–I).

[Bahasa Malaysia summary

Perayu (pempetisyen) pada 17 Januari 1994 telah diberikan perintah seperti dipohon untuk menggulung syarikat responden. Pada 10 Jun 1994, responden telah memohon untuk mengetepikan perintah keingkaran tersebut yang dibuat pada 17 Januari dan dibenarkan oleh Mahkamah Tinggi. Perayu telah merayu ke Mahkamah Rayuan. Mahkamah Rayuan memutuskan terdapat serahan petisyen penggulungan tersebut yang tidak teratur oleh kerana petisyen telah diserahkan ke alamat lama responden. Notice penukaran alamat berdaftar responden telah difailkan dengan Pendaftar Syarikat pada 1 Februari 1992 dan serahan petisyen tersebut pada 26 Februari 1992 di alamat yang terakhir. Oleh kerana tarikh berkuatkuasa bagi tujuan penukaran notis adalah pada tarikh kemasukan dan bukan tarikh notis penukaran dimasukkan dalam daftarai, serahan petisyen tersebut adalah tidak teratur di sisi undang-undang. Perayu telah merayu kepada Mahkamah Persekutuan. Persoalan timbul berkenaan dengan resit asal untuk penukaran alamat yang dikeluarkan oleh Pendaftar Syarikat dan salinannya di dalam rekod rayuan.

Diputuskan, membenarkan rayuan tersebut:

Terdapat perbezaan antara resit asal yang dikeluarkan oleh Pendaftar Syarikat dan salinan yang dimasukkan di dalam rekod rayuan. Di resit asal, terdapat dua nombor yang diberikan iaitu '082329T' dan '008085X' yang mesti dimiliki oleh dua syarikat yang lain dan bukannya responden. Nombor-nombor ini tidak boleh dilihat dengan jelas di dalam salinan tersebut. Selanjutnya, mengapa perkataan yang ditulis iaitu 'Richland Trade & Dev S/B Annual Return $50.00' tidak tertera di dalam yang asal juga tidak dijelaskan (lihat ms 394A–D). Mahkamah Rayuan akan mencapai kesimpulan yang sama jika mereka berpeluang melihat resit asal. Serahan ke atas responden adalah sah dan dengan itu penemuan Mahkamah Rayuan bahawa ia adalah sebaliknya mestilah diketepikan (lihat ms 394H–I).]

Notes

For a case on service of winding-up petition, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 886.

Cases referred to

Fawzia bte Osman v Bank Bumiputra (M) Bhd & another appeal [1991] 1 MLJ 426 (refd)

Lim Boon Peng v United Orient Leasing Co Bhd [1991] 1 MLJ 292 (refd)

Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263 (refd)

MUI Bank Bhd v Golden Hornbill Hotel Sdn Bhd [1993] 1 MLJ 290 (refd)

PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd [1958] MLJ 113 (refd)

A *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325 (refd)
Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd [1985] 1 MLJ 68 (refd)

B **Legislation referred to**
Companies Act 1965 s 218
Companies (Amendment of Schedules) Order 1993, Second Schedule Table of Fees
Companies (Winding-up Rules) 1972 r 25(1)

C **Appeal from:** Court of Appeal Civil Appeal No P–02–158–1994 (Court of Appeal, Kuala Lumpur)

Asbir Kaur Singh (*Hira Singh* with her) (*Asbir, Hira Singh & Co*) for the appellant.
Gurbachan Singh (*Teja Singh Penesar* with him) (*Bachan & Kartar*) for the respondent.

D **Chong Siew Fai CJ (Sabah & Sarawak)** (delivering judgment of the court): This is an appeal from the decision of the Court of Appeal on 5 June 1995 dismissing with costs the appellant's appeal from the decision of the High Court on 1 September 1994. Learned counsel for the appellant started off her submissions by raising a preliminary objection as regards the cross
E appeal as there had been no application for leave to do so although she had been served with the notice of cross appeal dated 11 November 1995.

The response from learned counsel for the respondent was that he was totally unaware of the situation as he had just been retained the day before. As such, he was not in a position to argue except to say that he was ready to
F proceed and that the circular from the Court of Appeal stated that no leave was necessary.

Learned counsel for the appellant's reply was that on the previous hearing date on 19 January 1998, the previous solicitors for the respondent had been discharged by the respondent who had been ordered to pay
G RM1,000 costs for the adjournment which were yet to be paid.

Since no leave to file a cross appeal was obtained when leave to file the appeal was given on 12 September 1995, we were of the unanimous view that the cross appeal should be, and was accordingly, struck out with costs.

In the High Court, the appellant was the petitioner and they had on 17 January 1994 been granted an order in terms to wind up the respondent
H because neither the respondent nor their counsel was present. On 10 June 1994, the respondent had applied for leave for extension of time to file the application and to set aside the default order made on 17 January 1994.

The learned High Court Judge was satisfied that the respondent had filed the application within the time specified by the Rules of the High
I Court 1980. The mistake, he concluded, was that of the court registry.

As for the setting aside, the learned High Court Judge agreed with the contention of the then learned counsel for the respondent on the ground that the words in the statutory notice dated 25 October 1991 namely

'interest of RM64.69 per day from 26 October 1991 till date of full settlement' made it defective as a result of the ambiguity. The learned High Court Judge held that it was not a mere irregularity which could be cured relying on *Fawzia bte Osman v Bank Bumiputra (M) Bhd & another appeal* [1991] 1 MLJ 426, *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263, *Lim Boon Peng v United Orient Leasing Co Bhd* [1991] 1 MLJ 292 and distinguishing the facts in *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1991] 3 MLJ 325.

In the Court of Appeal, a strong bench comprising Shaik Daud Ismail, Gopal Sri Ram and Siti Norma Yaakob JJCA, said through the presiding judge as follows:

> With respect, I am of the view that the learned judge ought not to apply principles enunciated in bankruptcy cases, in cases of winding up. Bankruptcy cases are governed by their own Act and Company winding-up cases are governed by an entirely different set of Act(s) and regulations. While it cannot be gainsaid that the liquidation or winding-up of a company has certain obvious affinities with the bankruptcy of an individual the courts should be careful not to stretch these affinities to such an extent that they lose sight of the fact that they may fall in danger of applying the law of bankruptcy to company winding-up proceedings. It must be remembered that in a winding-up proceeding there is nothing corresponding to an act of bankruptcy. In my view it is because of this aspect of this act of bankruptcy that the courts adopt a strict view in construing a bankruptcy notice. As a result of the Supreme Court decision in Fawzia's case, s 3(1)(i) of the Bankruptcy Act 1967 was amended by Act A827 with effect from 16 July 1992 to include the phrase 'with interest quantified up to the date of issue of the Bankruptcy Notice.' With this amendment the ambiguity and uncertainty earlier encountered by creditors came to an end.

In a subsequent paragraph, the judgment states:

> It is my view that the demand stipulated in the Companies Act 1965 is merely a warning to the creditor that if after three weeks he fails to pay, a Winding-up petition would follow. Therefore the demand need not exactly quantify the amount unlike in the Bankruptcy notice. Unlike a Bankruptcy notice there is no prescribed form of the statutory demand or notice as the whole object of the demand is to warn the debtor of an impending petition. (See Bateman Television Ltd & Anor v Coleridge Finance Co Ltd) (1969) NZLR 794 at 803. The failure to quantify does not render the demand of its real purport and objective. The provisions of s 218(2)(a) prescribe a simple method of which a creditor, to whom the company owes more than five hundred ringgit, can establish that the company is unable to pay its debts. In order for the demand to be effective, however, it must comply strictly with certain requirements as stipulated in the sub-section itself. The requirements are that the demand must be in writing under the hand of the creditor or his authorised agent, it must specify the sum due (no mention is made of quantifying it to the last cent). The demand must be served on the company by leaving it at the registered office. If these requirements are met, I am of the view that the demand is valid and if after three weeks the company fails to pay the amount demanded then the law deems it to be unable to pay its debts whereupon a winding-up petition would follow.

We agree with the views expressed by the Court of Appeal on this point. They would then have allowed the appeal but for another issue raised by learned counsel for the respondent which was not raised in the High Court.

The additional point was on the irregularity of the service of the winding up petition having regard to r 25(1) of the Companies (Winding-up Rules) 1972 ('the Rules'). The said r 25(1) provides, inter alia, that every petition to wind up a company shall be served upon the company at the registered office of the company, and if there is no registered office, then by leaving a copy with any member, officer, or servant of the company at the principal or last known principal place of business of the company, or if no such member, officer or servant can be found there, then by leaving a copy at the registered office or principal place of business.

Learned counsel for the respondent submitted that where the law had provided a special mode of service, that must be complied with failing which service would not be deemed to have been effected. It was held in *PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd* [1958] MLJ 113 that as the writ had not been served on the company at its registered office as required by the law, the service was held to be bad and the judgment in default was set aside.

We now turn to the facts of the present appeal relating to the issue of service. This is what the Court of Appeal said:

> In the present case, there is no dispute that the petition was served at 48 Rangoon Road, Penang on a Chinese person found thereat. According to the affidavit of one Chow Yen Kong the Manager of S & C Management Services Sdn Bhd dated 4 July 1994, who had been the Secretaries for the respondent Company since June 1985, the company had moved out of the old registered address at 48 Rangoon Road Penang in late April 1991 to its new address at 731 Dato Keramat Road, Penang, and the notice of this change dated 31 December 1991 was lodged with the Registrar of Companies on 1 February 1992. In the light of this it is contended that the service of the petition on 26 February 1992 at the respondent's old registered address was bad in law. No affidavit was filed to contradict this.
>
> In reply to this learned counsel for the appellant submits that an official search was made on 29 January 1992 and the registered address of the respondent was at 48 Rangoon Road and hence service was affected at that address. Therefore the service was good. In response to this learned counsel for the respondent refers the court to the case of *Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd* [1985] 1 MLJ 68. In that case the appellant purported to serve a writ on 1 July 1982 on the respondent company at an address which they believed to be the registered address of the company. The respondent company had in fact changed its registered address and the change had been notified to the Registrar of Companies on 20 February 1982. The notification of change was not, however, entered into the register until 24 September 1992. When no appearance was entered to the writ the appellants obtained judgement in default and execution proceedings were taken. The respondents when they came to know of the writ subsequently applied to have the writ set aside. The High Court gave judgment for the respondent. On appeal the then Federal Court held that the effective date of the change of the registered address is the date of the lodgement of the notice to the Registrar of

Companies, and the Court held that the learned judge was correct in holding that there had been no service of the writ and set aside the judgement.

The facts of the Summit case is similar to the present case. The notice of change was lodged with the Registrar of Companies on 1 February 1992 and service of the Petition was on 26 February 1992 at the old address. There was no affidavit filed on behalf of the appellant to contradict the date of the lodgement. Therefore following the decision in the *Summit* case, and this court is bound by that case, service of the Petition on the old address on 26 February 1992 must be bad in law. The fact that the particulars of the change had not been entered in the register is no concern of the respondent and is irrelevant. Once the notice of change under s 120 of the Companies Act 1965 had been lodged this should be the effective date even though the notification of the change is entered in the register much later. In the circumstances of this case I hold that the service of the petition on the respondent company is bad in law. For this reason which reason was never considered by the learned judge and for the earlier reasons pertaining to the statutory demand I would dismiss the appeal with costs. Deposit to go towards taxed costs.

The appellant referred us to the statutory declaration dated 28 October 1991 of the court clerk of a legal firm in Penang affirming that he had served the notice pursuant to s 218 of the Companies Act 1965 issued on 25 October 1991 on the respondent at their registered office at the ground floor of 48 Rangoon Road, Penang on 25 October 1991 itself.

Also, the relevant process server working for the appellant had deposed in his affidavit of service dated 18 March 1992 that on Wednesday, 26 February 1992 at 11.45 am, he had left an affidavit and a copy of the sealed petition, both dated 31 December 1991, on the desk in the respondent's registered office at the ground floor of 48 Rangoon Road, Penang in the presence of the respondent's Chinese clerk. In another paragraph, he had averred that a search had been made at the office of the Registrar of Companies on 29 January 1992 which showed that the respondent's registered address was indeed at the ground floor of 48 Rangoon Road, Penang since 24 January 1990.

Apart from that, the appellant tendered the details of the official search with the Registrar of Companies dated 29 February 1992, which listed details updated to 24 January 1990, stating that the respondent's registered address was at the ground floor of 48 Rangoon Road, Penang.

The respondent, on the other hand, tendered the affidavit dated 4 July 1994 of Chow Yen Kong ('Chow') the manager of the S & C Management Services Sdn Bhd, the secretary for the respondent, denying that the statutory notice and the petition had ever been served on the respondent as they had moved out completely from that address in or about late April 1991.

Chow had attached to his affidavit the 'notice of situation of registered office and of office hours and particulars of changes' in Form 44 which showed that the respondent had on 31 December 1991 moved from the ground floor of 48 Rangoon Road, Penang to the ground floor of 731, Dato Keramat Road, Penang. As for the official search, learned counsel for the

respondent argued that the details therein were the documents registered and not the documents lodged relying on *Summit Co (M) Sdn Bhd v Nokko Products (M) Sdn Bhd* where this court decided that the effective date of the change of the registered address is the date of the lodgment of the notice to the Registrar of Companies.

He had also exhibited the receipt from the Registrar of Companies wherein certain relevant details could not be read clearly and this, in a surprising turn of events at the adjourned hearing, became the deciding factor when it came to making our decision. We had adjourned the case to another date when learned counsel for the respondent offered to either produce the original of that receipt or bring the records of the Court of Appeal. We opted for the former because the latter would not solve the problem since the photocopy of the receipt in the Court of Appeal records would be equally indecipherable.

All along, we were quite inclined to agree with the finding of the Court of Appeal. But on the original receipt being produced by learned counsel for the respondent at the adjourned hearing, to say we were quite shocked would be an understatement.

The original receipt C 090558 and the photocopy are reproduced below to show the differences we found between the two:

(PS1-Pin1/87)

URUSAN SERI PADUKA BAGINDA

RESIT ASAL

NAMA .....
ALAMAT S & C MGT SVCS SDN BHD
731 DATO KERAMAT ROAD
10460 PENANG.

Jika tidak sampai kembalikan kepada:
Pendaftar Syarikat
Pejabat Pendaftar Syarikat
Kuala Lumpur, Malaysia

Pendaftar Syarikat Malaysia
Kuala Lumpur
RESIT

Kerana: PSM P.PINANG01 AC 090558
01/02/92015409*1 04 ******$100.00 PO
C 090558
082329T 008085X

Akuan Terima Wang akan dicap di sini dengan mesin Terima Wang Pejabat ini dan jika tiada bercap demikian maka pembayaran tidaklah diakui.

Panduan Butir-butir Pembayaran

Kod Bayaran Tunai		Kod Bayaran Cek	Bayaran Bagi
01	...	16	Borang berkanun syarikat tempatan

02	...	17	Borang berkanun syarikat asing	A
03	...	18	Modal yang dibenarkan	
04	...	19	Penyata tahunan	
05	...	20	Permohonan mencari/Menyimpan nama/Lanjutan masa menyimpan nama	B
06	...	21	Permohonan lanjutan masa bagi kira-kira/Mesyuarat agung	
07	...	22	Pemeriksaan fail syarikat	C
08	...	23	Denda/Bayaran lewat	
09	...	24	Perusahaan sekuriti	
10	...	25	Bayaran fotostat	
11	...	26	Lain-lain bayaran	D

'Kebenaran Perbendaharaan bil YSPK (8.15) 248-10 (SK 4)Jld 3/(8) bertarikh 12hb April 1979'

P-JPN, KL

Certified True Copy E

(Sgd)

Secretary
LS 0093

(P.S.1-Pin.1/87)

F

Urusan Seri Paduka Baginda

Resit Asal

Nama .....
Alamat (indecipherable)
.....

Jika tidak sampai kembalikan kepada: Richland Trade & Dev S/B G
Pendaftar Syarikat, Annual Return
Pejabat Pendaftar Syarikat, $50.00
Kuala Lumpur, Malaysia (handwritten)

Pendaftar Syarikat Malaysia
Kuala Lumpur
RESIT H

Kerana: (indecipherable)
C 090558

(indecipherable)

Akuan Terima Wang akan dicap di sini dengan mesin Terima Wang Pejabat ini dan jika tiada bercap demikian maka pembayaran tidaklah diakui. I

PANDUAN BUTIR-BUTIR PEMBAYARAN

Kod Bayaran Tunai		Kod Bayaran Cek	Bayaran Bagi
01	...	16	Borang berkanun syarikat tempatan
02	...	17	Borang berkanun syarikat asing
03	...	18	Modal yang dibenarkan
04	...	19	Penyata tahunan
05	...	20	Permohonan mencari/Menyimpan nama/Lanjutan masa menyimpan nama
06	...	21	Permohonan lanjutan masa bagi kira-kira/Mesyuarat agung
07	...	22	Pemeriksaan fail syarikat
08	...	23	Denda/Bayaran lewat
09	...	24	Perusahaan sekuriti
10	...	25	Bayaran fotostat
11	...	26	Lain-lain bayaran

Kebenaran Perbendaharaan bil YSPK (8.15) 248-10 (SK 4)Jld. 3/(8) bertarikh 12 April, 1979

P-JPN, KL
LS 0093

In the photocopy, the machine printed details for the name and address are not very clear and the machine printed words at the centre cannot be deciphered. In the original, the name and address are 'S & C Mgt Svsc Sdn Bhd, 731 Dato Keramat Road, 10460 Penang.'. The machine printed words read 'PSM P Pinang 01 AC090558 01/02/92 015409 *1 04 ******$100.00 Po 082329T 008085X'.

The handwritten words 'Richland Trade & Dev S/B Annual Return $50.00' in the photocopy are blanked out in the original and when questioned by the court, learned counsel for the respondent was not in a position to explain.

At the adjourned hearing, learned counsel for the respondent reiterated that the date on the original receipt was 1 February 1992 whereas the petition was served on the respondent on 26 February 1992 at the former address. This was clearly evident of the total disregard, he added, of r 25(1) of the Rules and making reference to *MUI Bank Bhd v Golden Hornbill Hotel Sdn Bhd* [1993] 1 MLJ 290 and *Summit Co (M) Sdn Bhd v Nokko Products*

(M) Sdn Bhd, he again brought to our attention the difference between lodging and registering the relevant particulars.

However, learned counsel for the appellant pointed out to us that the relevant number given by the Registrar of Companies was always stated on their documents pertaining to the company. She reminded us that for the particulars of the search made by the appellant on the respondent, the Registrar of Companies had put '31474-M' as the respondent's company number and this number appeared on the notice of change made by the respondent.

Yet on the original receipt, she submitted, there were two numbers given namely '082329T' and '008085X' which must belong to two other companies and not to the respondent. These numbers cannot be clearly seen in the photocopy which is included in the appeal records of this court and that of the Court of Appeal. In addition, the words 'Richland Trade & Dev S/B Annual Return $50.00' appearing on the photocopy but not on the original give the impression that the receipt refers to the respondent.

But this cannot be so now that the machine printed details on the original receipt can be read clearly. Further, why the handwritten words do not appear on the original has not been explained. It is also not disputed that Chow's company was secretary to a number of companies. Whether the handwritten words were put in intentionally, for the purpose of deception, or mistakenly, because of a mix-up, is anybody's guess.

At best, 731 Dato Keramat Road, Penang was the address of the respondent's secretary and not, in law, the registered office of the respondent when the petition was served. The receipt cannot be as regards by the respondent. This means that the respondent was still at the old registered address when the petition was served on 26 February 1992 and all this hullabaloo in the Court of Appeal about the service being void and ineffective remains only a hullabaloo.

The Table of Fees under the Second Schedule of the Companies (Amendment of Schedules) Order 1993 was produced by learned counsel for the appellant to show that the fee payable for 'lodging, registering, depositing or filing any other document with or by the Registrar under any Act (where the fee is not specified in any relevant Act or regulation)' is RM10 (item 59), but the receipt produced was for RM100 and since it was for two companies, it must be as regards an item in the Schedule amounting to RM50 per company. A look through the list shows that it cannot be for the purpose of a change of address. Learned counsel for the appellant had tendered a letter from the Registrar of Companies to state that the purpose was for the lodgment of annual returns. In any case, this point is irrelevant since the receipt does not concern the respondent.

On these considerations, we are confident that the Court of Appeal would have come to the same conclusion if they had had sight of the original receipt. We have no alternative but to hold that the service on the respondent is valid and consequently the finding of the Court of Appeal that it was otherwise has to be set aside. The appeal is allowed with costs here

A and in the courts below. The case is remitted to the High Court, Penang for a winding-up order on the winding-up petition dated 31 December 1992 to be made. The deposit is refunded to the appellant.

Appeal allowed.

B Reported by Benjamin Yong

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